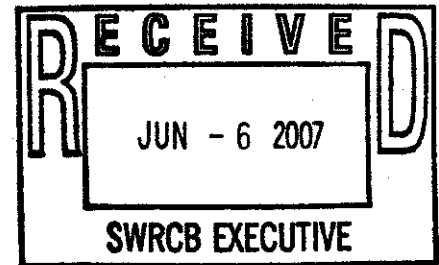


June 6, 2007



Via Personal Delivery and Email (commentletters@waterboards.ca.gov)

Attention: Song Her, Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: June 19, 2007 Water Right Enforcement Workshop

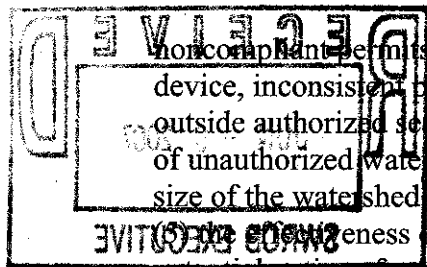
To the Members of the State Water Resources Control Board:

The undersigned engineering and law firms represent a broad diversity of public and private water users interested in the efficient administration of the State's water right permitting system. Our clients agree with the June 19, 2007 Water Right Enforcement Workshop notice that "[p]redictable, consistent and fair enforcement is required to ensure compliance with water right laws." Unfortunately, the scope of the proposed workshop does not offer an objective foundation for the development of a balanced State Water Resources Control Board water right enforcement policy.

To be viable, any enforcement policy must fully take into account the systemic problems plaguing the State Board's administration of water rights generally. The primary emphasis of an enforcement policy should be to remedy the root causes of noncompliance that are inherent in water right administration. A viable enforcement policy must recognize that there are relatively few water users who intentionally violate water laws and that most noncompliance results from mistake or lack of understanding of water laws. Unfortunately, there are no easy enforcement fixes. Water quality enforcement models developed for a general discharge prohibition/strict liability water quality regulatory system are not relevant for water right enforcement. Similarly, an Instream Flows Policy-type approach that places an additional layer of new substantive application standards will only exacerbate existing problems with the water right administration system.

Proposed Rescoping of Workshop

Given the need for a thorough discussion of the complex background issues in addition to proposed elements of an enforcement policy, we request that this workshop be continued and that at least two additional workshop days be scheduled. We also request that staff prepare a background paper that examines: (1) the nature and causes of the current application and petition backlog, with an assessment of the size and potential impacts of those pending applications and petitions; (2) the staff position and practices regarding Board water right permitting jurisdiction, with a discussion of how groundwater, diffused surface flow and other water sources outside of the Board's permitting jurisdiction are handled; (3) the number of



noncompliant permits and licenses and the categories of violations (e.g., lack of measuring device, inconsistent place and purpose of use and the extent of the inconsistency, diversions outside authorized season, and the amount of water diverted out of compliance); (4) the number of unauthorized water diversions, the amount of water represented by each diversion, and the size of the watershed above the smallest named tributary affected by the unauthorized diversion; (5) the effectiveness of current and past enforcement practices; and (6) staff's own assessment of potential options for a water right enforcement policy. This background paper should be prepared in advance of the continued workshop.

Enforcement and Water Rights Administration Problems are Intertwined

Water right enforcement principally entails enforcement for violation of water right permit terms and conditions and enforcement for unauthorized diversion and use of water. The workshop notice starts from the premises that permit violations and unauthorized water use are widespread, that many users intentionally evade compliance with water laws, that permit violations and unauthorized water use are injuring many water users and harming the environment, and that permit violations and unauthorized water use are major causes of the State Board's application and petition backlog. These premises are generally untrue and offer a skewed view of multiple, complex problems.

We fully support State Board enforcement targeted against permit violations and unauthorized water use where no cure has been sought by the water user, and that are clearly injuring other water users or harming the environment. Water users who intentionally evade compliance with State water laws in order to economically benefit and who harm the environment should be subject to enforcement. Water users who are "bad actors" are the exception rather than the rule, and most cases of noncompliance do not harm the environment or injure legal water users. Our experience has shown that recent Board enforcement efforts have expended limited resources chasing after minor violations to the detriment of higher priority water right administration needs. For example, the State Board has engaged in intensive enforcement of permit compliance in the Russian River and Navarro River watersheds, but this recent focus has not resulted in demonstrable benefit to water quality and aquatic resources of those watersheds or to other legal water users, nor have they been an efficient use of staff resources.

The enforcement load has grown substantially as a result of recent staff practices. The State Board has required water users asserting another basis of right (such as in the Russian and Navarro reservoir inspections) to prove the right, apply for an appropriative permit absent convincing proof, and/or be subject to an enforcement action. When faced with potential enforcement, a water user who has a pre-1914, riparian, or other hard-to-establish right will often file an application.

The Board has also not been consistent in defining what it considers to be a diversion from a natural watercourse – which is within its jurisdiction – versus a collection of diffused sheetflow. The Board similarly provides little guidance on whether it asserts jurisdiction over groundwater pumping from "subterranean streams" within its jurisdiction. Board staff has not consistently addressed either of these situations.

Board actions also discourage voluntary compliance. Permittees' voluntary compliance, for example in filing petitions to correct sometimes minor and inadvertent changes, has been used by the Board as an opportunity to demand unrelated conditions or renegotiate permit terms. If the water user does not accept the demands, the Board threatens to bring enforcement action against the permittee. This is a critical error. It discourages voluntary compliance in a manner inconsistent with good public policy and with efficient water rights administration.

The water right administration system is, for all intents and purposes, nonfunctional. The number of pending applications and petitions is near the all-time high. Many of the pending water rights applications and petitions in the North Coast region were filed in response to State Board informal enforcement inquiries or formal enforcement actions. As noted, even where facilities have valid water rights, when faced with a potential enforcement action, water users will often file an application. While the application and petition backlog has grown, total Division of Water Rights staff numbers have shrunk, and many of the remaining staff have been redirected to fee collection and enforcement. The Board's emphasis on enforcement in the North Coast region in particular has exacerbated the backlog.

Very few applications have been processed in recent years. We believe that the water rights process functioned fairly well before this backlog began to mount in the mid-1990's, when Board staff turned its energies to enforcement "sweeps" in North Coast watersheds. The Legislature's reduced funding of the Board and imposition of statutory mandates on the Board, such as fee collection, have exacerbated this problem, and have now placed the Board in an impossible situation. At this point, even substantial general fund allocations and a significant staff increase would be unlikely to yield results within even a decade. It is painfully obvious that stepped up enforcement efforts will make matters worse. The Board must alleviate the backlog through new approaches to water rights administration before any significant progress can be made in an enforcement policy.

Recommended Focus for Workshop

1. Provide a Fair Opportunity for Voluntary Compliance

The Board should develop an enforcement and compliance policy that facilitates voluntary compliance and encourages diverters to petition for changes and to file applications. All disincentives to bringing water users into the permitting system should be removed. More local outreach and education should accompany focused efforts to process the nearly 500 pending water rights applications and 600 petitions. The State Board must find a way to consistently and expeditiously process applications, change petitions, and extension petitions. We are concerned the State Board's increased focus on enforcement is being used to lessen the Board's application backlog (i.e., by canceling applications) without addressing the underlying problems. The Board must not abdicate its responsibility to administer the water rights system, including granting permits, approving changes, allowing time extensions, and issuing licenses where appropriate and consistent with the constitutional directive that water be put to reasonable and beneficial use.

We suggest that the State Board adopt the following as key elements of its enforcement policy:

- Initiate an informational campaign to educate water users. The State Board has taken this approach in the past (e.g., Carmel Valley). Include usable information on the State Board's website. This is an effort which the Division Chief fully supports. Revise and clarify regulations and adopt new regulations where appropriate to avoid the frustrating, counterproductive, and unfair effects of operating on the basis of illegal "underground" regulations.
- Suspend enforcement activities against those who have or are pursuing permits or change petitions and who have sought to cooperate with the Board. Concentrate efforts on processing applications and petitions with realistic goals for compliance and monitoring, except in cases of egregious bad faith violations.
- Do not penalize water users for delays outside of their control.
- Help the diverter, applicant, petitioner, permittee or licensee bring its project into compliance. Most violations are minor, and could be corrected without affecting others or the environment. Applicants should be given a fair opportunity to cooperate; if they do not, it may well be appropriate to bring an enforcement action where corrective measures have been identified and sufficient time has been allowed for compliance. A fair opportunity to cooperate will require developing reasonable and practicable timelines – as opposed to Board staff's frequent demand to comply within 30 days or be subject to cancellation.
- Stop using the number of cancellations as a measure of water rights administration "success".

2. *Improve the Existing Permitting System*

Modest changes to the water rights permitting system may produce substantial improvements for the administration of existing permits and licenses and water rights enforcement, without additional legislation and with rational realignment of priorities. The following recommended changes may largely be implemented by rule or policy under the existing Water Code and other statutes.

- Limit and prioritize compliance and enforcement activities until the backlog is resolved. The Board should immediately suspend enforcement until the backlog is resolved, except for egregious violations resulting in significant impacts to the environment or injury to other users. For example, permit compliance should focus on gross violations of permit terms and conditions, or large illegal diversions, as opposed to minor diversions or deviations from place of use, location of points of diversion, and similar changes.
- "Triage" the application and petition backlog. Expedite issuance of permits and approvals of petitions for small projects, projects with *de minimus* environmental impacts, and unprotected projects, to allow staff to focus on larger projects.

- Approve pending petitions for time extensions. The backlog of time extension petitions is so great that the requested extension period often expires before the Board acts on the petition. Granting time extension petitions would preserve the status quo and free staff to work on higher priority applications and petitions.
- Recognize insignificant changes and process those changes administratively. Many petitions are for changes in place of use or point of diversion where there is no meaningful change or potential impact. For example, places of use were often depicted decades ago on old USGS quad maps, and are now being compared by Board staff to coordinates obtained by a Global Positioning Satellite system. Inconsequential changes should be approved.
- Rescind the requirement that all private parties enter into CEQA MOUs. The Board has required that all private applicants and petitioners enter into a "Memorandum of Understanding for Preparation of Environmental Documents" whereby the applicant or petitioner pays an environmental consultant to prepare California Environmental Quality Act documents under State Board supervision. The private party has no role in supervising the work of the environmental consultant. This MOU requirement is an underground regulation that conflicts with a CEQA Guideline that lists an MOU as one of four options available to the Board and private applicants and petitioners. The Board should give pending applicants the *option* of entering into an MOU. The State Board should accept CEQA analyses prepared by competent environmental consultants directly contracted by private applicants and petitioners. (The CEQA MOU process is discussed in more detail below.)
- Circulate draft Initial Studies and Negative Declarations for public review in a timely manner. If a State Board CEQA consultant is not providing competent work product, the opportunity for public review of draft work will greatly help applicants (who pay for the CEQA consultant's work) to determine if a CEQA consultant is not competent. State Board staff complain about CEQA consultants' work, but will not disclose which consultants' work is not adequate in staff's view.
- Improve noticing of applications and petitions. Expedite the issuance of application and petition notices. Board staff have recently improved the noticing of water right applications and petitions, but noticing time lags far behind the Division Chief's directive to notice within three days of receipt. Notices should inform all interested regulatory agencies and parties that the application is being processed. Staff has experimented with various options, and should be encouraged to continue to improve the noticing process.
- Facilitate the coordination of water rights permit proceedings with all permitting and trustee agencies with an interest in a pending water right application. The goal is to reduce agency staff time and to provide early and effective coordination between the applicant, protestants, and agencies with jurisdiction and permitting authority.
- Improve the protest process. Protests to applications and petitions serve an important function; however, the Board should adopt binding, minimum threshold standards for Board acceptance of protests to applications. Set binding standards for fortification or substantiation of both water rights and environmental protests within the CEQA compliance schedule. Protestants

asserting only environmental concerns should be required to assert substantial evidence of these concerns and relate them to the specific application or petition in question rather than simply alleging general, watershed-wide problems. Applicants should be allowed to submit briefing and obtain a pre-decisional ruling from the Division on the validity of the protests.

- Adopt target schedules for completion of water rights permitting proceedings. These schedules should reflect the size and complexity of projects.

3. *Improve CEQA Compliance for the Water Right Process*

Recent changes in the CEQA compliance process by Board staff have further choked the water right system. The State Board must comply with CEQA before granting applications and petitions. The State Board relies on CEQA analyses prepared by public agency applicants and petitioners. For private applicants and petitioners, the Board has the option to: prepare the CEQA analysis itself; contract for the preparation of the analysis; accept a draft analysis prepared by the applicant or petitioner; execute a Memorandum of Understanding ("MOU") with the applicant to govern the preparation of a draft analysis by an independent contractor; or use a previously prepared analysis. Cal. Code Regs, tit. 14, § 15084(d). When a CEQA document is prepared by another entity, the State Board must subject the draft to its own review and analysis and the draft analyses sent out for public review must reflect its independent judgment. *Id.*, § 15084(e). The State Board used to prepare its own CEQA analyses for private entities' applications and change petitions. Now, the Board instead demands in every instance that private applicants and petitioners enter into an MOU pursuant to which (1) an environmental consultant prepares the CEQA analysis; (2) the applicant pays for the work but is not involved in the preparation and review of the CEQA analysis; (3) Board staff supervises, and in many cases rewrites, the consultant's work.

Demanding MOUs in every instance is an impermissible underground regulation and a major cause of the application and petition backlog. The Board staff is not able to effectively handle the current backlog of environmental processing for active MOUs. The MOU process has resulted in much greater costs and delays, with no increase in quality, than would have occurred if the applicant were able to directly contract with and supervise the environmental consultant. The State Board's current directive that all pending private applicants and petitioners enter into an MOU means that the staff's work load for administering MOUs will expand even more. Until the State Board has resolved the present backlog or at least adopted regulations authorizing it to require all private parties to enter into MOUs, it must *rescind its requirement* for new MOUs, and instead give pending applicants the *option* of entering into an MOU and the option to rescind existing MOUs. The State Board should accept CEQA analyses prepared by competent environmental consultants directly contracted by private applicants and petitioners, consistent with CEQA Guideline section 15084.

Board staff also do not consistently follow the State Board Chief Counsel Opinion on CEQA baseline. The June 10, 2005 memorandum of former Chief Counsel Craig Wilson to Victoria Whitney, Chief of the Division of Water Rights, provides that the CEQA baseline for projects, including existing facilities, is the current environmental setting in almost every instance. This means that existing facilities seeking water rights permits for existing water uses,

and extension and change petitions not resulting in new impacts or requiring construction of new facilities, should be exempt from CEQA compliance. Typical State Board staff practice is currently to require a CEQA analysis for permitting existing facilities and operations. Consistent application of the CEQA baseline opinion will reduce the very substantial CEQA MOU-caused delays in the water rights system.

4. *Administer Water Rights Using a Watershed Management Approach*

The Board should consider administering water rights using a watershed management approach. A watershed approach may include joint processing of applications in a watershed, joint biological and hydrological studies, permit terms tailored to the watershed such as terms requiring diversion rotation, and stream-specific instream flow protections. This approach should first be tested through pilot projects in the North Coast region.

5. *Adopt Special Permitting and Change Petition Programs*

There have been instances in the past where the legislature and the Board have created special programs to address specific problems. For the Napa River, the Board adopted a special regulation (Cal. Code Regs., tit. 23, § 735) to allow certain storage of water for frost protection in order to deal with the problem that "... [d]uring a frost, the high instantaneous demand for water for frost protection by numerous vineyardists and other water users frequently exceed the supply in the Napa River stream system." To address the problem that stockponds were largely outside the State Board permit system, the legislature enacted Water Code section 1226 *et seq.* The 1974 stockpond law applied only to stockponds constructed before 1969 and which did not exceed 10 acre-feet as of 1975, and allowed issuance of a "certificate of a water right" for claimants who filed by the end of 1997.

A special permit program for the North Coast could, similarly, be a means to bring diverters into the State Board water rights system and to facilitate, by the imposition of terms and conditions, productive changes for the benefit of fishery and other resources. Similarly, special change petition programs, such as to approve minor changes in place of use or to expedite dedications of water rights to instream flow under Water Code section 1707, should be enacted.

6. *Utilize "Real" Hydrology and Biology*

The Board staff's insistence that applicants in the North Coast region (and increasingly, the rest of the state) satisfy the Department of Fish and Game and NOAA Fisheries Service Draft "Guidelines for Maintaining Instream Flows to Protect Fisheries Resources Downstream of Water Diversions in Mid-California Coastal Streams" ("Draft Guidelines"), is another underground regulation that has had disastrous results for water right administration. The Draft Guidelines were developed to be a conservative screening tool to be used by the fisheries agencies to decide whether to protest small water right applications in North Coast streams because of potential impacts to salmonid species. The Draft Guidelines were originally explained by senior Board staff as a means to determine what level of analysis (e.g., CEQA compliance) should be used – again, as a screening tool – not as a substantive litmus test. However, the Draft Guidelines have been applied by Board staff as substantive standards which

only the smallest diversions in a handful of watersheds can theoretically satisfy. Furthermore, the methodology endorsed by the guidelines is not premised upon sound hydrology or biology. The Draft Guidelines have not only not helped reduce the extensive backlog of pending water rights applications, but have made that backlog much worse. The Board should discontinue use of overly simplistic screening tools like the Draft Guidelines and should instead ensure that real hydrology and real biology are used in water right administration as they were in the past.

The Board is required to make a finding of water availability prior to issuing a permit. A water availability analysis provides the basis for determining that there is sufficient water available for an application to be permitted. From a hydrologic, engineering standpoint, standard "desk top" analytical approaches have been used for many years to provide water availability information to the Board. In addition to determining the availability of water from a hydrologic, engineering standpoint, the Board also determines what otherwise available water should not be diverted in order to provide for instream beneficial uses. That inquiry has for many years relied on the environmental review process and protestants' efforts. The application backlog should not be used as an excuse to discontinue the traditional desktop hydrologic analyses. The Draft Guidelines and similar screening tools that do not assess real hydrologic conditions are not a substitute for desktop analyses; the Draft Guidelines may use the term "water availability analysis", but what is required to be analyzed by the Guidelines is in no way a standard, informative engineering assessment of water availability.

Stream- and watershed-specific instream flow needs have not yet been developed in the North Coast due to lack of funding, inadequate or conflicting agency mandates, and lack of critical mass of interested stakeholders. The Board and fisheries agencies have sought to use simple equations like the Draft Guidelines to compute the minimum necessary instream flows in any stream, but these conservative surrogate indices do not account for actual stream- and watershed-specific conditions. The current backlog of water rights applications and amount of staff resources dedicated by regulatory agencies and stakeholders may now provide critical mass to develop instream flow needs on a watershed basis. Many of our clients with pending water rights applications would be willing to cooperate with other applicants in the same watershed or on the same stream to identify, or at least contribute funding for efforts to identify, instream flow needs tailored to local conditions.

Specific Responses to Workshop Notice Questions

1. Should the State Water Board adopt enforcement provisions in its AB 2121 policy?

a. AB 2121 Does Not Mention Enforcement

The purpose of AB 2121 and Water Code section 1259.4 is to adopt principles and guidelines for instream flow protection in the North Coast region. Water Code section 1259.4 says nothing about enforcement. Enforcement must be considered in the AB 2121 Instream Flows Policy because the Board's current targeted compliance and enforcement efforts in the Russian River and Navarro River watersheds is a significant cause of the current application backlog. It may therefore be necessary to include enforcement provisions in the Instream Flows

Policy, but the highest priority for the Instream Flows Policy should be given to efforts to improve the water rights application process to bring as many diversions into the water rights system as possible and to reflect changes that are the focus of petitions.

The enforcement workshop notice does not state whether information from this enforcement workshop will lead to an enforcement policy that will be incorporated into or will modify the in-development Instream Flows Policy. Affecting the Instream Flows Policy through this workshop without adequate notice to the participants involved in the Instream Flows Process is misleading and may also be prohibited by the California Administrative Procedures Act and California Environmental Quality Act. Continuing this workshop could address this issue, as well as the need to encompass water rights administration generally.

b. "Smart" Enforcement

Enforcement activities should be conducted in a way that encourages sound resource management and compliance. The enforcement activities should also consider the relative impact that a particular violation causes and should prioritize enforcement away from minor things like relatively inconsequential changes to existing permits and licenses. In other words, we need "smart" enforcement, with reasonable priorities and emphasis, and based on the rationale that diverters should be brought into a well-administered water rights system. Inclusion – not exclusion and cancellation – should be the State Board's goal.

2. *Should the State Water Board adopt an enforcement policy for areas of the state that are outside the mandated geographic scope of the AB 2121 policy? If the State Water Board adopts an enforcement policy that applies to other areas of the state, should it contain the same enforcement provisions as the AB 2121 policy?*

a. Enforcement Policies Should Apply Statewide

An enforcement policy should be developed for the entire state for two reasons. First, water users and the general public demand consistency of enforcement. The current intense enforcement in the North Coast region—the investigation of nearly every water diversion regardless of size or potential environmental impact—is fundamentally different from previous Board practices and from practices in other parts of the state. These North Coast enforcement "sweeps" are unprecedented. Issues that have been ignored as a low priority or inconsequential in other parts of the state are being subjected to rigid enforcement or threatened enforcement in the North Coast. Second, although the resource problems and application backlog in the AB 2121 North Coast Region are acute, they are acute because the Board has decided to concentrate there; these issues are present in the rest of the state to varying degrees.

b. No Enforcement Policy Should Be Adopted before the AB 2121 Policy Is Considered

Until the Instream Flows Policy is complete, it is premature to suggest whether the statewide enforcement policy should contain the same enforcement provisions as the AB 2121 policy.

3. *How should the State Water Board set enforcement priorities? What factors should it consider in setting enforcement priorities?*

- a. "Smart" Enforcement Should Be the Goal

Enforcement priorities should principally be based on gravity of the violation, the effectiveness of available enforcement remedies, enforcement that results in and encourages voluntary compliance, and staff time and cost. The Board should balance the cost and time of enforcement versus voluntary compliance.

4. *Currently the State Water Board's Division of Water Rights (Division) identifies one or more watersheds per year in which it will conduct compliance inspections. In the past, watersheds have been selected after consultation with the Regional Water Quality Control Boards, the California Department of Fish and Game, and federal fishery agencies. The Division selects the watershed(s) on which it will focus its enforcement resources based on potential impacts to water quality and aquatic resources. The Division then conducts both investigations of unauthorized diversions and compliance inspections of permitted and licensed water supply projects within the selected watershed(s). Should the State Water Board continue to focus its water right enforcement resources on specific watersheds? If so, how should those watersheds be selected? If not, what other basis should be used?*

The recent focus on the Russian River and Navarro River watersheds has not resulted in demonstrable benefit to water quality and aquatic resources of those watersheds or an efficient use of staff resources. Enforcement should be focused on watersheds, streams, and specific unauthorized water uses for which enforcement efforts would provide the most benefit. The Board's focus on the Russian and Navarro watersheds made sense from a fisheries perspective initially, but four years of compliance inspections and threatened and actual enforcement actions have done nothing to improve the environment of those watersheds or protect senior rights holders. Instead, the enforcement activities have created a massive backlog of more than 320 pending applications and many pending change petitions, and settlements of a few administrative civil liability complaints and cease and desist orders for small unauthorized diversions. The Russian and Navarro watersheds would benefit more from an educational campaign and improved processing of applications and petitions than from draconian cease and desist orders and administrative civil liability complaints.

Enforcement should be a last resort and should be directed to the most egregious violations, where the Board's enforcement activities would be most cost-effective and result in clear benefits to other diverters and the environment.

5. *Should the State Water Board provide an opportunity for voluntary compliance or corrective actions before initiating formal enforcement actions and, if so, under what circumstances? How long a time should the State Water Board allow for voluntary compliance?*

a. Voluntary Compliance Programs Should be First Priority

When violations are identified, State Board should help the diverter, applicant, petitioner, permittee or licensee understand how to bring its project into compliance; most violations are very minor, and could be corrected without harm to others or the environment. If applicants refuse to comply after corrective measures have been identified and sufficient time is allowed for compliance, it might be appropriate to bring an enforcement action.

b. Timelines for Voluntary Compliance Must Be Fair, Reasonable, and Practicable

The time that should be allowed for voluntary compliance will often depend on State Board staff availability and delays in the CEQA process (especially for private applicants and petitioners required to enter into the CEQA MOU) more than other factors. It is not appropriate to impose time limitations for voluntary compliance unless constraints outside the control of the water users are either fixed, or not counted against the diverter.

6. *The State Water Board has pending over 500 water right applications. Many of these applications were filed to seek authorization for existing, but unauthorized, water supply projects. Should the State Water Board initiate enforcement against existing applicants that are diverting water without authorization? Under what conditions should the State Water Board initiate enforcement actions against these applicants?*

a. The Board Staff Has Directed Existing Applicants to File Applications

The State Board has encouraged water diverters to seek water rights permits, and should not now initiate enforcement actions. Scarce staff resources are best spent on helping bring water diverters into the permitting system. Some significant number of these applicants have rights outside of the Board's permitting jurisdiction, and are exercising riparian and groundwater rights, or are collecting diffused surface water.

b. Board Staff Should Not Turn to Enforcement as a Panacea for Its Application and Petition Backlog

The State Board is facing much scrutiny from the water right fees litigation, the application and petition backlog, and ongoing state audit. The Board staff has been pushed by circumstances to use cancellations as a measure of "progress". Canceling applications and petitions does not improve the management of the State's water resources. It is not an acceptable measure of water rights administration "success". The State Board is directed by the California Constitution and Water Code to require that the water resources of the State be put to beneficial use to the fullest extent of which they are capable.

7. *The State Water Board has pending over 600 petitions to change existing water right permits or licenses. Many of these petitions were filed to seek authorization for changes in place or purpose of use or point of diversion that have already taken place without seeking the required prior approval of the change from the State Water Board. Should the State Water Board initiate enforcement against existing petitioners that are diverting*

water in violation of the conditions of their water right permits or licenses? Under what conditions should the State Water Board initiate enforcement actions against these petitioners?

a. Petitions for Minor Changes and Corrections Should Be Processed Expeditiously

Permit terms are not always precise, and the Water Code and State Board regulations do not clearly define how compliance is ascertained. A major cause for a large number of pending change petitions is that Board staff interpretation of permit compliance has shifted from a substantial compliance standard to a strict compliance standard. Older permits and licenses were issued before the advent of GPS units, and, as a consequence, the places of use and points of diversion were approximated. Now, Board compliance inspections use GPS units to precisely define, for example, the current place of use, and require the water user to file petitions to modify the permit to reflect the new GPS measurements. Also, in the past a minor change in the place of use was deemed inconsequential and State Board staff would issue an administrative permit correction of the place of use; now, Board staff require that a change petition be filed to authorize such a change.

b. New Regulations Should Define "Minor" Changes

The State Board regulations provide little meaningful guidance to staff and permittees and licensees. The Board should adopt clear thresholds for compliance with permits terms. For example, there should be a presumption that minor changes in place of use are inconsequential and do not require a change petition.

8. *The State Water Board has four potential formal enforcement options available: (1) issuance of a Cease and Desist Order, (2) issuance of an Administrative Civil Liability (monetary penalty), (3) referral of the matter to the Attorney General for fines or injunction or both, and (4) revocation of a permit or license. In some cases, a violation may result in only one type of action, and in other cases, a violation could result in more than one type of action. What conditions should be present before the State Water Board considers imposing each of the potential enforcement options?*

a. None of the Four Potential Enforcement Options Should Be Imposed Against a Water User Seeking to Bring the Diversion into Compliance Voluntarily

None of the four potential enforcement options should be imposed against a water user seeking to bring the diversion into compliance voluntarily.

b. The Choice of Enforcement Mechanism Depends on Many Factors

A cease and desist order is appropriate where a water user has failed to come into voluntary compliance after having been given a fair and adequate opportunity to comply. An ACL is appropriate where a water user has failed to come into voluntary compliance after having been given a fair and adequate opportunity to comply with a cease and desist order, and the noncompliance has resulted in significant impact to the environment or injury to water users.

Staffing and priorities at the Attorney General's Office dictate that State Board referrals to the Attorney General should be reserved for the highest priority alleged violations where a significant litigation defense is likely to occur.

- c. A Permit or License Should Be Revoked Only for the Most Significant Violations and after the Permittee or Licensee Has Failed to Come into Voluntary Compliance after Having Been Given a Fair and Adequate Opportunity to Comply

A permit or license should be revoked only for the most significant violations and after the permittee or licensee has failed to come into voluntary compliance after having been given a fair and adequate opportunity to comply.

- d. A Board Staff Background Paper Would Help to Better Define These Issues and How to Approach Them

As requested at the beginning of this letter, continuing this workshop and directing staff to prepare a background paper would be very helpful.

- 9. *If a Cease and Desist Order is determined to be appropriate, should the State Water Board provide an opportunity in the Cease and Desist Order for the recipient of the order to continue to divert water while coming into compliance? If so, what conditions and time schedule for compliance should the State Water Board impose? What other factors should the State Water Board consider in determining a reasonable time schedule for compliance to be included in any Cease and Desist Order?*

- a. The Recipient of a Cease and Desist Order Should Be Allowed to Continue Diverting in Most Cases

In most cases the recipient of a cease and desist order should be allowed to continue diverting. An order to cease all diversions may itself result in significant adverse impacts, including greater impacts than are caused by the unauthorized diversion itself.

- 10. *Under what circumstances, if any, should a Cease and Desist Order require the permanent removal of an illegal diversion facility?*

- a. A Diversion Should Be Permanently Removed Only Where There is No Legal Option to Bring the Diversion into Compliance

A diversion should be permanently removed only where there is no legal option to bring the diversion into compliance and the facility poses significant harm to the environment or water users. CEQA compliance will be required before any facilities can be removed.

11. *The State Water Board has the authority to issue Administrative Civil Liability (ACL) of up to \$500 per day of unauthorized diversion and use or up to \$1000 per day for violation of a Cease and Desist Order. If an ACL complaint is deemed appropriate, how should the monetary penalty be calculated in order to ensure that the monetary penalty is effective in compelling compliance with water right law? What factors should the State Water Board consider in setting the amount of the monetary penalty?*

A cease and desist order is appropriate where a water user has failed to come into voluntary compliance after having been given a fair and adequate opportunity to comply. An ACL should be computed according to a sliding scale based on the severity of the impact, the intent of the diverter, deterrence, and should be offset by actions to bring diversions into compliance and avoid or mitigate adverse impacts.

12. *What factors should the State Water Board consider when determining whether to refer a violation to the Office of the Attorney General for prosecution?*

- a. Referrals to the Attorney General Should be Reserved for the Highest Priority Alleged Violations Involving Significant Litigation

Water users subject to ACLs and other enforcement actions may prefer that the matters be referred to the Attorney General for litigation in civil court where there is greater protection of due process. Nevertheless, staffing and priorities at the Attorney General's Office dictate that State Board referrals to the Attorney General should be reserved for the highest priority alleged violations where a significant litigation defense is likely to occur.

13. *What factors should the State Water Board consider when determining whether to revoke a water right permit or license as a result of violation of permit or license terms?*

A permit or license should be revoked only for the most significant violations and after the permittee or licensee has failed to come into voluntary compliance after having been given a fair and adequate opportunity to comply.

14. *The State Water Board has the authority to revoke water right permits and licenses if the water right fees due on the permit or license are not paid for five or more years. Should the State Water Board consider revoking water right permits and licenses for failure to pay water right fees? If so, under what conditions should the permit or license be revoked?*

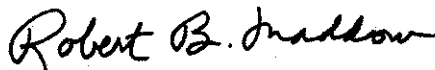
Permits and licenses should not be revoked for non-payment of fees. It is especially inappropriate to consider revoking permits and licenses where the Board has been directed by the court to develop a revised fee schedule that complies with California law and addresses concerns about fairness to water right holders.

Conclusion

To be viable, any enforcement policy must fully take into account the systemic problems plaguing the SWRCB's administration of water rights generally. The primary emphasis of an enforcement policy should be to remedy the root causes of noncompliance that are inherent in water rights administration, rather than to punish instances of noncompliance. A viable enforcement policy must recognize that there are relatively few water users who intentionally violate water laws, and that most noncompliance results from mistake or lack of understanding of water laws. Unfortunately, there are no easy enforcement fixes. Water quality enforcement models developed for a general discharge prohibition/strict liability water quality regulatory system are not relevant for water rights enforcement. Similarly, an Instream Flows Policy-type approach that places an additional layer of new substantive application requirements will only exacerbate existing problems with the water rights administration system. We appreciate the opportunity to comment on the development of a water rights enforcement policy and look forward to participating in the workshop.

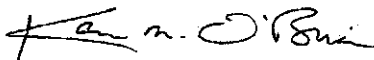
Sincerely,

BOLD, POLISNER, MADDOW, NELSON
& JUDSON



Robert Maddow

DOWNEY BRAND LLP

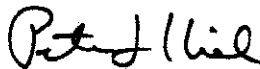


Kevin M. O'Brien



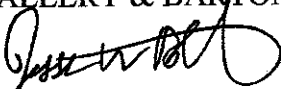
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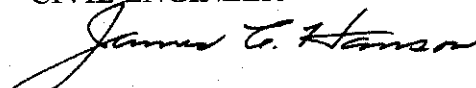


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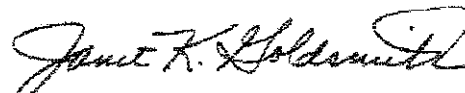
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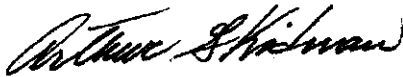
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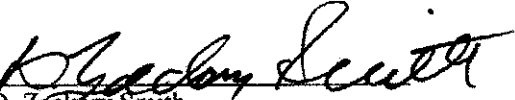


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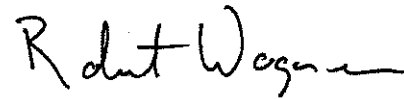
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